

A JOSEPHINE PREMILA SIVARETNAM v. KETUA PESURUHJAYA
SURUHANJAYA PENCEGAHAN RASUAH MALAYSIA & ANOR
HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[JUDICIAL REVIEW NO: PA-25-30-05-2024]
B 25 JUNE 2024

C **Abstract** – *Enforcement bodies have the power, vide the Malaysian Anti-Corruption Commission Act 2009 ('MACCA'), to initiate investigations into criminal offences that occurred prior to the coming into force of the MACCA, and by logical extension thereof, they surely must also be able to use the tools contained in the MACCA in the course of such investigations. The possibility that the offences may have been committed prior to 2009 cannot, and does not, negate the legality of notices to obtain information issued pursuant to s. 36(1)(b) of the MACCA, rendering the s. 36 notices valid and not illegal/ultra vires. Especially when the enforcement bodies have reasonable grounds to believe an offence has been committed and there is no procedural impropriety when the said s. 36 notices are issued, the rights of the applicant under arts. 5, 7 and 8 of the Federal Constitution are not violated. Thus, where there is no unfair state action against the applicant but rather an enforcement body utilising express powers given to them in relation to an investigation process being properly carried out, carrying out such investigative powers are not amenable to judicial review.*
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ADMINISTRATIVE LAW: *Judicial review – Proceedings – Rules of Court 2012, O. 53 – Application for leave to commence judicial review seeking to quash notices to obtain information issued pursuant to s. 36(1)(b) of Malaysian Anti-Corruption Commission Act 2009 ('MACC') – Whether notices tainted with illegality, irrationality and/or procedural impropriety – Whether should be issued at commencement of investigation – Whether notices fulfilled legal requirements under s. 36(1)(b) of MACC – Whether notices prejudicial to applicant – Whether enforcement bodies have power vide MACC to initiate investigation into criminal offences that occurred prior to MACC 2009 – Whether enforcement bodies entitled to use tools contained in MACC in course of investigation – Whether notices violated applicant's constitutional rights guaranteed under arts. 5, 7 and 8 of Federal Constitution – Whether investigative powers of enforcement bodies amenable to judicial review proceedings – Whether granting of leave exercise in futility*
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CRIMINAL LAW: *Corruption – Investigation – Application for leave to commence judicial review seeking to quash notices to obtain information issued pursuant to s. 36(1)(b) of Malaysian Anti-Corruption Commission Act 2009 ('MACC') – Whether notices tainted with illegality, irrationality and/or procedural impropriety – Whether should be issued at commencement of investigation – Whether notices fulfilled legal requirements under s. 36(1)(b) of MACC – Whether notices prejudicial to applicant – Whether enforcement bodies have power vide MACC to initiate investigation into criminal offences that occurred prior to MACC 2009 – Whether enforcement bodies entitled to use tools contained in MACC in course of investigation – Whether notices violated applicant's constitutional rights guaranteed under arts. 5, 7 & 8 of Federal Constitution – Whether investigative powers of enforcement bodies amenable to judicial review proceedings – Whether granting of leave exercise in futility*

The applicant commenced a judicial review proceeding, pursuant to O. 53 of the Rules of Court 2012, seeking to quash three notices to obtain information issued pursuant to s. 36(1)(b) of the Malaysian Anti-Corruption Commission Act 2009 ('MACC') served on the applicant ('s. 36 notices') and a declaration that the said s. 36 notices were invalid. The applicant was also seeking a stay of proceedings in relation to the said s. 36 notices pending the hearing and disposal of this application. The basis of the applicant's application were these three main grounds: (i) that the said s. 36 notices issued by the first respondent, acting as the Chief Commissioner of the second respondent, were tainted with illegality, irrationality and/or procedural impropriety as: (a) the respondents did not have the power to issue the said s. 36 notices to obtain information from the applicant; (b) the said s. 36 notices were used as the starting point of the investigation. It should be issued by the second respondent after an investigation had been conducted, and not before any investigation is conducted or at the commencement of such investigation; (c) from 1997 until 1999 and from 1 June to the present, Abdul Daim Zainuddin ('Daim') was not an officer of a public body. As such, during these periods, there could not have been any offence(s) under s. 23 of the MACC committed by Daim; (d) the said s. 36 notices did not fulfil the legal requirements under para. 36(1)(b) of the MACC; (e) the respondents failed to demonstrate that the applicant was an associate of Daim under any of the five categories defined in the interpretation of 'associate' in s. 3 of the MACC; (ii) that the said s. 36 notices, which require the applicant to provide information covering the period from 1997 to the present, for 27 years, were unreasonable, disproportionate, oppressive and/or procedurally improper in that, *inter alia* (a) it was impossible and impractical for the applicant to fully comply with the said s. 36 notices and effectively provide the requested information as it involved numerous detailed transactions to which the applicant no longer had access; (b) the said s. 36 notices, which were unclear, covered a long

- A period and required extensive information, were prejudicial to the applicant because any unintentional failure, mistake or omission to declare all of the applicant's assets may lead to or expose the applicant to possible prosecution; (iii) that the said s. 36 notices issued by the respondent had violated the applicant's constitutional rights guaranteed under arts. 5, 7 and 8 of the Federal Constitution ('FC') and was therefore unconstitutional. The Attorney General, in objecting to the leave application, contended that (i) investigative powers of the enforcement bodies were not amenable to judicial review proceedings; (ii) that investigative powers may only be challenged where there is dishonesty or *mala fide* or exceptional circumstances; (iii) that the onus of proving *mala fide* on the part of the respondents was on the applicant; and (iv) that a higher threshold of scrutiny should be applied.

Held (dismissing application for leave with no order as to costs):

- (1) The s. 36 notices requiring information for a period of 27 years were not too extensive and unreasonable. The applicant herself averred that she had made attempts to retrieve the relevant information required in the said s. 36 notices and these included requests made to several banks for bank statements/details but there had yet to be any reply to date. The applicant also averred she had since retired and was no longer active in the business world and most documents and records previously held by her were disposed of in 2020. These were, at best, mere impracticalities and had no bearing on the issuance and/or legality of the said s. 36 notices themselves. The applicant should comply with the said notices and provide/disclose information that she had and it would then be up to the respondents to consider their next course of action if there had been insufficient information provided. If criminal action was commenced against the applicant for any non-disclosure, she would be at full liberty to raise any issues as a defence therein in relation to any inability to provide information. (para 20)
- (2) The applicant's contention, that the said s. 36 notices were tainted with irrationality and/or procedural impropriety on the ground that they had been issued before any investigation had been conducted, was without merit. Whilst s. 36 of the MACC clearly allows the respondents to require the applicant to furnish the information if it had reasonable grounds to believe based on the investigation that an offence had been committed, based on the actual notice, it was clear that this had been complied with as a perusal of the notice would clearly reflect that based on investigations, an offence under s. 23 of the MACC had been committed. There did not seem to be any basis for the applicant's contention that the s. 36 notices to the applicant was the starting point for investigation when the notices themselves clearly indicated that the investigation had already commenced. (para 21)

- (3) Further, whilst the said s. 36 notices referred to the fact that the request for information to the applicant was on the basis that she was an associate of Daim, having perused s. 36(1)(b) of the MACC, it provides that the respondents may require any relative or associate or any other person whom the officer has reasonable grounds to believe is able to assist in the investigation to furnish a statement. Reverting to the actual s. 36 notices, the respondents were of the view and believed that the applicant could assist in the investigations. There was no necessity to demonstrate at this juncture how and why the applicant was considered an associate and stating that the disjunctive belief that she may assist in the investigation was sufficient. (para 22)
- (4) The respondents could indeed investigate offences prior to MACC 2009. The applicant's contention that the said s. 36 notices were illegal/*ultra vires* was without merit for the following reasons. Firstly, there was no doubt that the MACC only came into force in 2009 and that the said s. 36 notices were issued seeking information from 1997 to date. Prior to MACC, the Public Prosecutor had powers to issue notices seeking information under s. 32 of the Anti-Corruption Act 1997 which was *pari materia* with s. 36 of the MACC. The respondents have the power to initiate investigations of criminal allegations that occurred prior to MACC based on the latin maxim of *nullum tempus occurit* (*Dr Che Abdul Daim Haji Zainuddin & Ors v. Suruhanjaya Pencegahan Rasuah Malaysia & Anor*). If the respondents do indeed have the power *vide* MACC 2009 to initiate investigations into criminal offences that occurred prior to MACC 2009, then by logical extension thereof, they surely must also be able to use the tools contained in the MACC 2009 in the course of such investigations. (paras 25-31)
- (5) Since the investigation into the possible offences committed by Abdul Daim was only commenced after the coming into force of MACC 2009, then, notwithstanding that the information so requested by the said notices may relate back to 1997, the said s. 36 notices were still valid and properly issued by the respondents. The very purpose of s. 36 of the MACC 2009 is to provide the respondents with the necessary tools to investigate possible offences where such investigations have only commenced after the coming into force of MACC 2009. Further, the possibility that the offence may have been committed prior to 2009 could not and did not negate the legality of the said s. 36 notices herein. The respondents were certainly entitled to use the s. 36 notices as they have for any investigations that have commenced after the coming into force of MACC 2009. (paras 35 & 36)

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- A (6) The respondents had reasonable grounds to believe that an offence had
B been committed by Abdul Daim and further believed that the applicant
C may assist in the investigation. There was no procedural impropriety on
 the part of the respondents when issuing the said s. 36 notices. Section
 36 notices were not retrospective or *ultra vires* and did not violate the
D rights of the applicant under arts. 5, 7 and 8 of the FC. There had been
 no unfair state action against the applicant but rather an enforcement
 body utilising express powers given to them in relation to an
 investigation process being properly carried out. It is trite law that the
 carrying out of such investigative powers are not amenable to judicial
E review unless possibly on the grounds of *mala fides* or if exceptional
 circumstances existed warranting the court's interference. There were
 no *mala fides* nor any exceptional circumstances herein warranting the
 court's interference by way of judicial review. (paras 37 & 38)
- D (7) The applicant failed to establish *prima facie* that the issuance of the said
 s. 36 notices fell within the traditional grounds for judicial review nor
 had they established *mala fide*. As such, the general proposition of law
 that the exercise of functions in relation to criminal investigations was
 not amenable to judicial review prevailed. No arguable case had been
 disclosed in favour of granting any relief therefore negating any
 requirement for a substantive hearing as requested and that granting
 leave would be an exercise in futility. (paras 40 & 41)

Case(s) referred to:

- Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks
Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC (*refd*)
- F Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia
 & Anor [1997] 4 CLJ 725 HC (*refd*)
- City Growth Sdn Bhd & Anor v. The Government of Malaysia [2005] CLJU 193; [2005]
1 LNS 193 HC (*refd*)
- Dr Che Abdul Daim Hj Zainuddin & Ors v. Suruhanjaya Pencegahan Rasuah Malaysia
& Anor [2024] 6 CLJ 884 HC (*refd*)
- G Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian
 Perdagangan Dalam Negeri dan Hal Ehwal Pengguna Malaysia & Anor [2018] Supp
 MLJ 16 (*refd*)
- Kanawagi Seperumaniam v. Dato Abdul Hamid Mohamad [2004] 5 MLJ 495 (*refd*)
- Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors [2017] 5 CLJ 595 CA (*refd*)
- Regina v. Director Of Public Prosecutions, Ex Parte Kebilene And Others [2000] 2 AC 326 (*refd*)
- H Suruhanjaya Pencegahan Rasuah Malaysia & Ors v. Latheefa Beebi Koya & Anor [2017]
 10 CLJ 1 FC (*refd*)
- Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ
927 CA (*refd*)
- WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC (*refd*)

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Legislation referred to:

Anti-Money Laundering, Anti-terrorism Financing And Proceeds Of Unlawful Activities Act 2001, ss. 4(1), 32, 50(1)

Criminal Procedure Code, ss. 51A

Federal Constitution, arts. 5, 7(1), 8, 145

Malaysian Anti-Corruption Commission Act 2009, ss. 5(6), 6(4), 23, 36(1)(b), 74(3)

Rules of Court 2012, O. 53 r. 3(2), (3)

For the applicant - Amer Hamzah Arshaad, Joshua Tay & Kee Shu Min; M/s Amerbon
For the respondents - Teh Li Siew; SFC

Reported by Suhainah Wahiduddin

JUDGMENT**Anand Ponnudurai J:****Introduction**

[1] The applicant commenced this judicial review proceedings pursuant to O. 53 of the Rules of Court 2012 seeking the following reliefs:

- (a) Suatu perintah *certiorari* untuk membatalkan Notis untuk mendapatkan maklumat di bawah seksyen 36(1)(b) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 yang diserahkan kepada Pemohon pada 23 Februari 2024, 22 Mac 2024 dan 26 April 2024 (Notis-Notis Seksyen 36 tersebut);
- (b) Suatu deklarasi bahawa Notis-Notis Seksyen 36 tersebut adalah tidak sah;
- (c) Apa-apa relif lanjutan atau relif lain yang dianggap adil oleh Mahkamah.
- (d) Penggantungan (stay) prosiding atas Notis-Notis Seksyen 36 tersebut sementara menunggu bicara dan pelupusan pendengaran permohonan substantifsemanakan kehakiman ini.

[2] It is not disputed that the second respondent is an entity established under the Malaysian Anti-Corruption Commission Act 2009 (hereinafter referred to as "MACC 2009") for the prevention of corruption in Malaysia, whereas the first respondent is its Chief Commissioner responsible for the directions, control and supervision of all matters related to the MACC 2009.

[3] It is clear that the applicant through this application seeks to quash three notices to obtain information issued pursuant to s. 36(1)(b) of the MACC 2009 served on the applicant on 23 February 2024, 22 March 2024 and 26 April 2024 (collectively referred to as "the said s. 36 notices") and a declaration that the said s. 36 notices are invalid.

A [4] The applicant is also seeking a stay of proceedings in relation to the said s. 36 notices pending the hearing and disposal of this application.

[5] As prescribed by O. 53 r. 3 Rules of Court 2012, it is mandatory that leave be first obtained for an application for judicial review. Whilst O. 53 r. 3(2) Rules of Court 2012 provides that such leave application may be made
B *ex parte*, O. 53 r. 3(3) of the Rules of Court 2012 provides that the applicant must give such notice of application for leave to the Attorney General's Chambers. There is therefore no doubt that the involvement of the Attorney General at the leave stage is expressly recognised and the court is obliged to hear the Attorney General at the leave application stage. See the cases of
C *Kanawagi Seperumaniam v. Dato Abdul Hamid Mohamad* [2004] 5 MLJ 495 and *Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors* [2017] 5 CLJ 595; [2017] 4 MLJ 656.

[6] The Attorney General appears at the leave stage in the capacity of AG and as the guardian of public interest and not for the particular respondent(s).
D In most cases, especially in those where the application relates to a decision of an inferior tribunal, the Attorney General generally will not object to the leave application. However, in this case, when the matter was first called up for the hearing of the leave application on 4 June 2024, learned Senior Federal Counsel appearing for the AGC had informed the court that the AG
E intended to object to the leave application herein. I thus fixed the leave application for hearing on 18 June 2024 and granted an interim stay of the said s. 36 notices.

[7] I had on 18 June 2024 heard learned counsel for the applicant and learned Senior Federal Counsel, and upon their request had allowed both to
F file a further brief submission on 21 June 2024 and fixed the matter for decision on 25 June 2024.

[8] Having considered the facts and the submission of both parties, I will hereinbelow set out the grounds for this application, the contentions of the applicant and the learned Senior Federal Counsel and my analysis of the same with a view to deciding whether or not leave should be granted to the
G applicant as prayed for.

Grounds For Judicial Review

[9] From the affidavit filed and the submissions of learned counsel for the
H applicant, it is clear that the basis for this application is on three main grounds as follows:

(i) that the said s. 36 notices issued by the first respondent, acting as the Chief Commissioner of the second respondent are tainted with illegality, irrationality, and/or procedural impropriety as:
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- (a) the respondents do not have the power to issue the said s. 36 notices to obtain information from the applicant; A
- (b) the said s. 36 notices were used as the starting point of the investigation. It should be issued by the second respondent after an investigation has been conducted, and not before any investigation is conducted or at the commencement of such investigation. The said s. 36 notices should be used to verify the findings of the second respondent's investigation to trace and track assets related to the alleged offences; B
- (c) from 1997 until January 1999 and from 1 June 2001 to the present, Abdul Daim bin Zainuddin (Daim) was not an officer of a public body. As such, during these periods, there could not have been any offence(s) under s. 23 of the MACC 2009 committed by Daim; C
- (d) the said s. 36 notices did not fulfil the legal requirements under para. 36(1)(b) of the MACC 2009; D
- (e) the respondents failed to demonstrate that the applicant is an associate of Daim under any of the five categories defined in the interpretation of 'associate' in s. 3 of the MACC 2009. The applicant cannot be categorised as falling under the definition of 'associate' as provided in s. 3 of the MACC 2009. E
- (ii) that the said s. 36 notices, which require the applicant to provide information covering the period from 1997 to the present, for 27 years, are unreasonable, disproportionate, oppressive and/or procedurally improper in that: F
 - (a) the information requested over the 27-year period is extensive and not limited to property held or acquired by Daim as a result of or in connection with offences under s. 23 of the MACC 2009.
 - (b) the information requested includes identifying the status of each asset, whether transferred or not transferred, whether within or outside Malaysia, owned or held by the applicant or concerning which the applicant has any interest, the date the assets were acquired, the method of acquisition, estimated value, the location of each identified asset, sources of income, acquisitions, or assets of the applicant from 1997 to the present, and so forth; G H
 - (c) it is impossible and impractical for the applicant to fully comply with the said s. 36 notices and effectively provide the requested information as it involves numerous detailed transactions to which the applicant no longer has access; and I

- G Objections Raised By The Attorney General**
- [10]** The Attorney General in objecting to the leave application herein contends as follows:
- H (i)** that investigative powers of the enforcement bodies are not amenable to judicial review proceedings;
- (ii)** that investigative powers may only be challenged where there is dishonesty or *mala fide* or exceptional circumstances;
- (iii)** that the onus of proving *mala fide* on the part of the respondents is on the applicant; and
- I (iv)** that a higher threshold of scrutiny should be applied.

Analysis

Applicable Law

[11] As a general rule, decided cases clearly reveal that the threshold for granting leave for judicial review is quite low and that an applicant only needs to show that *prima facie* the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application and there are grounds to consider the allegations made by the applicant. See the case of *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; [1990] 3 MLJ 228.

[12] However, decided cases have also held that leave should be refused where:

- (i) the subject matter of the judicial review is one which by settled law (written law or common law) is non-justiciable. See the Court of Appeal case of *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60; and
- (ii) it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies and where the application for judicial review is inappropriate. See the case of *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224.

[13] In relation to cases where judicial review applications refer to the investigative powers of enforcement bodies, decided cases support the position that such investigative powers are not amenable to judicial review proceedings. The High Court in the case of *City Growth Sdn Bhd & Anor v. The Government of Malaysia* [2005] CLJU 193; [2005] 1 LNS 193; [2006] 1 MLJ 581 (which was affirmed by the Federal Court in the case of *Empayar Canggih Sdn Bhd v. Ketua Pengarah Bahagian Penguatkuasa Kementerian Perdagangan Dalam Negeri Dan Hal Ehwal Pengguna Malaysia & Anor* [2018] Supp MLJ 16) held that s. 50(1) of the Anti-Money Laundering Act 2001 (hereinafter referred to as “AMLA 2001”) is part and parcel of the investigation process into an offence under s. 4(1) of the AMLA 2001 and by issuing the said orders, the deputy public prosecutor was merely exercising a function under the AMLA 2001.

[14] The proposition in the case of *City Growth (supra)* has been affirmed by the Federal Court in *Empayar Canggih (supra)* where in that case, the enforcement officers from the Ministry of Domestic Trade and Consumer Affairs raided a factory of the appellant – a manufacturer of video compact discs – and seized machinery and equipment under the Optical Discs Act

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**SURUHANJAYA PENCEGAHAN RASUAH MALAYSIA****NOTIS UNTUK MENDAPATKAN MAKLUMAT**

Seksyen 36(1)(b) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009
(Akta 694)

Kepada:-

JOSEPHINE PREMILA SIVARETNAM

(NO. K/P: 541205-01-5508)

PADA menjalankan kuasa yang diberikan kepada Pesuruhjaya/
Timbalan Ketua Pesuruhjaya/ Ketua Pesuruhjaya di bawah
seksyen 36(1) Akta Suruhanjaya Pencegahan Rasuah 2009, saya

TAN SRI DATO' SRI HJ AZAM BIN BAKI

KETUA PESURUHJAYA

SURUHANJAYA PENCEGAHAN RASUAH MALAYSIA

mempunyai alasan munasabah untuk mempercayai, berdasarkan
penyiasatan bahawa satu kesalahan di bawah **Seksyen 23** Akta
ini berkaitan Nombor Aduan: **IPJ/RPTNO:0145/2023** telah
dilakukan oleh **Abdul Daim Bin Zainuddin**, Nombor Kad
Pengenalan **380429-02-5233** dan kamu selaku **sekutu** orang
tersebut dipercayai dapat membantu dalam penyiasatan ini dan
dengan ini memberi notis menghendaki kamu supaya memberi
pernyataan yang benar dan mendedahkan segala maklumat yang
diketahui secara bertulis dengan bersumpah atau berikrar:-

- (i) yang mengenalpasti tiap-tiap harta, sama ada alih
atau tak alih, sama ada di dalam atau di luar
Malaysia, yang dipunyai atau dimiliki oleh kamu,
atau yang mengenainya kamu mempunyai apa-apa
kepentingan, sama ada di sisi undang-undang atau
ekuiti, **bermula dari 1997 hingga terkini** dan
menyatakan tarikh setiap harta yang dikenal pasti
itu diperolehi, dan cara bagaimana ia diperolehi sama
ada dengan jalan urus niaga, bekues, devis,
pewarisan, atau apa-apa cara lain;

SPRM 020/09

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3. **AMBIL PERHATIAN** bahwa menurut seksyen 36(2) Akta tersebut, seseorang yang dihantar kepadanya satu NOTIS di bawah seksyen 36(1) hendaklah, walau apa pun mana-mana undang-undang bertulis atau rukun undang-undang yang

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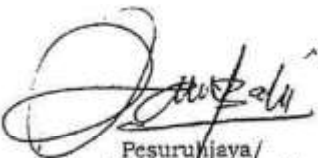
berlawanan, mematuhi terma NOTIS ini dalam masa yang dinyatakan di dalamnya, dan mana-mana orang yang dengan sengaja mengabaikan atau tidak mematuhi terma NOTIS ini adalah melakukan suatu kesalahan dan apabila disabitkan boleh dipenjarakan selama tempoh tidak melebihi lima tahun dan boleh didenda tidak melebihi satu ratus ribu ringgit.

4. **AMBIL PERHATIAN** bahawa menurut Seksyen 36(5) Akta tersebut, seseorang yang dihantar kepadanya satu NOTIS di bawah seksyen 36(1) Akta tersebut, hendaklah terikat untuk menyatakan yang benar dan hendaklah mendedahkan segala maklumat yang diketahui, atau tersedia untuknya atau yang dapat diperoleh olehnya.

26 APR 2024

Tarikh




 Pesuruhjaya/
 Timbalan Ketua Pesuruhjaya/
 Ketua Pesuruhjaya.
 TAN SRI DATO' SRI H. AZAM BIH BAKI
 KETUA PESURUHJAYA
 KOMISIYAT PENCEGAHAN RASuah MALAYSIA

[20] Reverting back to the contentions of the applicants. First and foremost, I have no hesitation whatsoever in rejecting the second ground advanced that the said s. 36 notices requiring information for a period of 27 years are too extensive and unreasonable. In this regard, the applicant herself has averred that she had made attempts to retrieve the relevant information required in the said s. 36 notices and these include requests made to several banks such as Hong Leong Bank Berhad, CIMB Bank Berhad, Malayan Banking Berhad as well as RHB Bank Berhad for bank statements/details but there has yet to be any reply to date. The applicant has also averred she has since retired and is no longer active in the business world and most documents and records previously held by her were disposed in

- A 2020. With respect, in my view, these are at best mere impracticalities and have no bearing on the issuance and/or legality of the said s. 36 notices themselves. In my further view, the applicant should comply with the said notices and provide/disclose information that she has and it will then be up to the respondents to consider their next course of action if there has been
- B insufficient information provided. If criminal action is commenced against the applicant for any non-disclosure, she would be at full liberty to raise any issues as a defence therein in relation to any inability to provide information.

- [21] Similarly, on the applicant's contention that the said s. 36 notices are tainted with irrationality and/or procedural impropriety on the ground that
- C they have been issued before any investigation has been conducted and/or that they have failed to demonstrate that she is an associate of Abdul Daim Bin Zainuddin, I again find this contention without merit. In this regard, whilst s. 36 of the MACC 2009 clearly allows the respondents to require the applicant to furnish the information if it has reasonable grounds to believe
- D based on the investigation that an offence has been committed, based on the actual notice, it is clear that this has been complied with as a perusal of the notice will clearly reflect that based on investigations, an offence under s. 23 of the MACC 2009 has been committed. There does not seem to be any basis for the applicant's contention that the s. 36 notice to the applicant was the
- E starting point for investigation when the notice themselves clearly indicates that the investigation had already commenced.

- [22] Further, whilst the said s. 36 notices refer to the fact that the request for information to the applicant is on the basis that she is an associate ("sekutu") of Abdul Daim Bin Zainuddin, having perused s. 36(1)(b) of the
- F MACC 2009, it provides that the respondents may require any relative or associate or any other person whom the officer has reasonable grounds to believe is able to assist in the investigation to furnish a statement. Reverting to the actual s. 36 notices, it is clear that the respondents are of the view and believe that the applicant can assist in the investigations. In my view, there
- G is no necessity to demonstrate at this juncture how and why the applicant is considered an associate and stating that the disjunctive belief that she may assist in the investigation is sufficient.

- [23] However, at the hearing of the leave application, it became clear that the crux of the applicant's submission in this application is that the said
- H s. 36 notices are illegal and/or *ultra vires* primarily due to the fact that the information sought through the same date back to 1997 but that s. 36 of the MACC 2009 came into force only in 2009. As such, it is contended that the utilisation of the said s. 36 notices was in excess of jurisdiction as the said notices being a tool to investigate were non-existent prior to the enactment
- I of the MACC 2009. It is further contended by the applicant that whilst the respondents do indeed have the power to investigate offences prior to MACC 2009 *via* the Prevention of Corruption Act 1961 and the Anti-Corruption Act

1997, it is submitted that the utilisation of the said s. 36 notices could only be utilised from the effective date of 2009 and that the saving clause in s. 74 of the MACC 2009 does not assist the respondents.

[24] During submissions, reference was made by both parties to the recent decision of *Dr Che Abdul Daim Hj Zainuddin & Ors v. Suruhanjaya Pencegahan Rasuah Malaysia & Anor* [2024] 6 CLJ 884; [2024] 4 MLRH 260 where the High Court there had ruled that s. 74(3) of the MACC 2009 was an express saving provision. However, I note that the issue in that case was whether or not it was proper to commence an investigation on an allegation of an offence that occurred more than 20 years ago and prior to the MACC 2009. However, in the present case, the facts are slightly different in that the issue is one of whether or not the respondents have the power to use s. 36 of the MACC 2009 as a tool to investigate offences preceding 2009.

[25] In my view, there can be no doubt that the respondents can indeed investigate offences prior to the MACC 2009. In such situation, the issue then is how are they to proceed to carry out such investigation and whether they can resort to s. 36 of the MACC 2009 to issue notices as a means to obtaining information even for offences commenced prior to 2009. Having considered all matters, I am of the view that the applicant's contention that the said s. 36 notices are illegal/*ultra vires* is without merit for the following reasons.

[26] Firstly, there is no doubt that the MACC 2009 only came into force in 2009 and that the said s. 36 notices were issued seeking information from 1997 to date. Prior to the MACC 2009, the Public Prosecutor had powers to issue notices seeking information under s. 32 of the Anti-Corruption Act 1997 which is in *pari materia* with s. 36 of the MACC 2009.

[27] Further, s. 6(4) of the MACC 2009 provides as follows:

6. Appointment of other officers of the Commission.

...

(4) Every officer and junior officer of the commission shall have such powers as may be provided for him under this Act and shall be subject to the direction, control and supervision of the chief commissioner or any other officer of the commission superior to him in rank, and shall exercise his powers, perform his functions, and discharge his duties in compliance with such directions or instructions as may be specified orally or in writing by the chief commissioner or any other officer of the commission superior to him in rank.

[28] Similarly, s. 5(6) of the MACC 2009 provides as follows:

5. Chief Commissioner.

(6) The chief commissioner shall have all the powers of an officer of the commission and shall have such powers of a Deputy Public Prosecutor as authorized by the Public Prosecutor for the purposes of this Act.

A [29] In the recent decision of the High Court of *Dr Che (supra)*, it was held that the respondents have the power to initiate investigations of criminal allegations that occurred prior to the MACC 2009 based on the Latin maxim of *nullum tempus occurrit*. Justice Wan Fareed held there as follows:

B As to whether it was proper to commence an investigation on an allegation of an offence that occurred more than twenty years ago, I am of the respectful view that the maxim of *nullum tempus occurrit* regi applies. It simply means “time does not run against the Crown”. That the defence of the alleged offence is stale, so to speak, is unknown to our criminal law. If, at all, as demonstrated in *PP v. Mark Koding* [1982] 1 MLRH786; [1983] 1 MLJ 111, the contention that an offence is “stale”
C can only be argued as an extenuating circumstance during plea in mitigation upon conviction.

[30] The above decision of the High Court was affirmed by the Court of Appeal on 17 May 2024.

D [31] In my considered view, if the respondents do indeed have the power *vide* the MACC 2009 to initiate investigations into criminal offences that occurred prior to the MACC 2009, then by logical extension thereof, they surely must also be able to use the tools contained in the MACC 2009 in the course of such investigations.

E [32] In relation to the applicability of the saving clause of s. 74(3) of the MACC 2009, it appears that both parties are of the view that the saving clause provided under s. 74(3) of the MACC 2009 is not applicable. s. 74(3) of the MACC 2009 reads as follows:

F 74. Saving.

F ...

G (3) The provisions of this Act which relate solely to procedure or evidence shall apply to any offence against the law repealed under section 73 and such provisions may be used in the course of any pending investigations and in any court proceedings instituted before or after the commencement of this Act in respect of such offence.

H [33] In the current case, there is no disputing that there were no investigations or pending investigations into Abdul Daim before the MACC 2009 came into force as investigations were commenced only in 2023 after receiving a complaint *ie*, much later after the MACC 2009 came into force. The situation would be different if there was a pending investigation against Abdul Daim prior to coming into force of the MACC 2009 and then the said s. 36 notices be utilised by the respondents herein. In such circumstances, the validity of the said s. 36 notices could be challenged on the basis that such notices should properly be issued by the Public Prosecutor.
I

- [34] However, in the current case, it is beyond per adventure that there was no investigation prior to the MACC 2009 and that investigations were only initiated post-MACC 2009. In such a scenario, the applicant now contends that ss. 51 and 51A of the Criminal Procedure Code should be the tools utilised to obtain the information from the applicant. With respect, I disagree. Firstly, s. 51 of the Criminal Procedure Code is a summons to produce documents and is issued whenever any court or police officer considers the production necessary. Here and in the current situation, we are dealing not with the summons to produce documents but rather a notice under a specific Act to obtain information following an investigation into an offence committed under the very same Act.
- [35] In my view, since the investigation into the possible offences committed by Abdul Daim was only commenced after the coming into force of the MACC 2009, then, notwithstanding that the information so requested by the said notice may relate back to 1997, the said s. 36 notices are still valid and properly issued by the respondents. In my opinion, the very purpose of s. 36 of the MACC 2009 is to provide the respondents with the necessary tools to investigate possible offences where such investigations have only commenced after coming into force of the MACC 2009.
- [36] In my further view, the possibility that the offence may have been committed prior to 2009 cannot and does not negate the legality of the said s. 36 notices herein. In my opinion, the respondents are certainly entitled to use the s. 36 notices as they have for any investigations that have commenced after the coming into force of the MACC 2009. In my opinion, just because the offence may possibly predate 2009, it is certainly cannot be expected of them to then rely on the Public Prosecutor or the court to issue summons under s. 51 of the Criminal Procedure Code for the production of documents when they have express powers given to them under the MACC 2009 to issue notices requesting for information.
- [37] As such, under all the circumstances of the case, I find that the said s. 36 notices are valid and not illegal/*ultra vires* as contended. In my view, as the respondents have reasonable grounds to believe that an offence has been committed by Abdul Daim and further believes that the applicant may assist in the investigation, there was no procedural impropriety on the part of the respondents when issuing the said s. 36 notices. I also find that the said s. 36 notices are not retrospective or *ultra vires* and do not violate the rights of the applicant under arts. 5, 7 and 8 of the Federal Constitution.
- [38] In my opinion, there has been no unfair state action against the applicant but rather an enforcement body utilising express powers given to them in relation to an investigation process being properly carried out. It is trite law that the carrying out of such investigative powers are not amenable to judicial review unless possibly on the grounds of *mala fide* or if exceptional

A circumstances exist warranting the court's interference. On the facts adduced so far, I find no *mala fide* nor any exceptional circumstances warranting the court's interference by way of judicial review.

Conclusion

B [39] In conclusion, the applicant has attempted to persuade me that leave should be granted and that the following issues require a detailed examination and determination *via* a substantive hearing:

- C (i) whether the respondents have the power or jurisdiction under s. 36 of the MACC 2009 to issue notices requesting information for periods preceding the coming into force of the MACC 2009?
- D (ii) whether s. 74 of the MACC 2009 confers the power or jurisdiction to the respondents to issue notices by way of s. 36 of the MACC 2009 requesting information for periods preceding the coming into force of the MACC 2009?
- (iii) whether the s. 36 notices issued against the applicant contravene art. 7 of the Federal Constitution?

E [40] For the various reasons set out in this judgment, with respect, I am not so persuaded. The applicant has failed to establish *prima facie* that the issuance of the said s. 36 notices falls within the traditional grounds for judicial review nor have they established *mala fide*.

F [41] As such, the general proposition of law that the exercise of functions in relation to criminal investigations is not amenable to judicial review prevails. I further find that no arguable case has been disclosed in favour of granting any relief therefore negating any requirement for a substantive hearing as requested and that granting leave would be in exercise in futility. See the case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296.

G [42] In the upshot, I am of the view that leave is not warranted and would dismiss the application for leave with no order as to costs.

H

I